

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 31 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0273
)	DEPARTMENT B
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MARK VINCENT SANCHEZ,)	the Supreme Court
)	
Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103605001

Honorable Terry L. Chandler, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Nicolette Kneup

Tucson
Attorneys for Appellant

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin

Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 Appellant State of Arizona appeals from the trial court's order granting appellee Mark Sanchez's motion to dismiss the aggravated driving while under the influence of an intoxicant (DUI) charges against him or alternatively to suppress evidence obtained during the investigation of Sanchez for those offenses after he invoked his right to counsel. For the reasons stated below, we affirm.

¶2 In determining the propriety of the trial court's ruling, we review only the evidence presented at the suppression hearing, *State v. Newell*, 212 Ariz. 389, ¶ 22, 132 P.3d 833, 840 (2006), which we view in the light most favorable to sustaining the ruling, *State v. Garcia-Navarro*, 224 Ariz. 38, ¶ 2, 226 P.3d 407, 408 (App. 2010). Although we review the ruling for an abuse of discretion, we review any legal questions, including constitutional claims involving the right to counsel, de novo. *State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001); *see also State v. Glassel*, 211 Ariz. 33, ¶ 59, 116 P.3d 1193, 1210 (2005). We defer to the court's factual findings and will not disturb those findings unless they are clearly erroneous. *State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005).

¶3 In reviewing the trial court's ruling, we are mindful of additional principles that pertain to a criminal defendant's right to counsel. Both the state and federal constitutions provide criminal suspects with a right to counsel that may be exercised "as soon as feasible after a defendant is taken into custody." *Kunzler v. Pima Cnty. Superior Court*, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987), *quoting* Ariz. R. Crim. P. 6.1(a). The defendant may, therefore, seek the advice of counsel during an investigation so long as by exercising that right the defendant does not hinder the investigation. *Id.*

¶4 Pima County Sheriff's Deputy Gwaltney testified at the suppression hearing that he had stopped the car Sanchez was driving because he had observed it weave a few times within its lane. Upon speaking with Sanchez, he noted certain signs that Sanchez had been drinking intoxicating beverages. He smelled alcohol on Sanchez's breath, Sanchez's speech appeared to be slurred, and Sanchez seemed to be swaying and had difficulty maintaining his balance as he walked. Sanchez admitted his driver license had been suspended and he had been drinking alcohol that evening. Sanchez refused to participate in field sobriety tests. Gwaltney then administered the *Miranda* warnings, *see Miranda v. Arizona*, 384 U.S. 436, 444 (1966), informing Sanchez of his constitutional rights. According to Gwaltney, Sanchez said he "didn't wish to . . . participate any further or answer the questions." Sanchez, however, testified he had requested counsel, telling Gwaltney, "I'd like to call an attorney because I made the comment my life is sober and I'd like to speak to an attorney."¹ Gwaltney did not ask any more questions and the DUI investigation continued. Gwaltney read Arizona's Implied Consent Law to Sanchez and a deputy phlebotomist was called and obtained a sample of Sanchez's blood to determine his blood alcohol concentration (BAC), after which Sanchez was arrested and booked into the county jail.

¹The suppression hearing was held over a two-day period with Sanchez testifying almost two weeks after Officer Gwaltney, who did not mention any invocation of counsel by Sanchez. Although the state argues on appeal that the trial court erred in finding Sanchez had invoked his rights to counsel for Sixth Amendment purposes, the state did not recall Gwaltney, offer any additional evidence, or refute Sanchez's testimony in any way.

¶5 Following the suppression hearing on Sanchez's motion to dismiss the charges or, alternatively, to suppress the BAC test results based on a violation of his constitutional *Miranda* rights, the state filed a memorandum in which it distinguished a defendant's right to counsel under *Miranda* and the right to counsel under Arizona's Implied Consent Law. The trial court issued a minute entry ruling in which it asked Sanchez to clarify whether his motion was based on a violation of *Miranda* or a violation of his right to counsel under the Sixth Amendment. Sanchez filed a responsive memorandum, in which he clarified his position that, based on the Sixth Amendment as well as federal and state case law, he was entitled to a dismissal of the charges for the violation of his right to counsel at a time when he potentially could have collected exculpatory evidence, or, alternatively, to suppression of the BAC results. *See, e.g., State v. Rosengren*, 199 Ariz. 112, ¶¶ 17-19, 27-32, 14 P.3d 303, 309-10, 312-13 (App. 2000); *see also McNutt v. Superior Court*, 133 Ariz. 7, 10, 648 P.2d 122, 125 (1982).

¶6 In a detailed minute entry granting the motion to dismiss, the trial court noted there was no dispute Sanchez had invoked his right to counsel. Rather, it determined the dispute had to do with the scope of the invocation. The state contended Sanchez had invoked the right to counsel only insofar as his rights under *Miranda* and the Fifth Amendment were implicated. Sanchez maintained, however, he had invoked his right to counsel broadly, seeking the right to consult with an attorney not just before making any statements to law enforcement officers, but with respect to any investigation against him and any period of time during which counsel might have been able to collect potentially exculpatory evidence, rights guaranteed by the Sixth Amendment and Rule

6.1, Ariz. R. Crim. P. The court rejected the state's argument that Sanchez's invocation of counsel was limited because it had followed his receipt of the *Miranda* warning. Relying in part on *Rosengren* and *McNutt*, the court concluded the state had presented no evidence that permitting Sanchez to consult with counsel before deciding whether to submit to a blood test and incarcerating him in the jail would have impeded the DUI investigation and by depriving him of counsel, law enforcement might have deprived him of the opportunity to obtain exculpatory evidence.

¶7 On appeal, the state has not established the trial court abused its discretion. The state insists the court erred when it found Sanchez had intended to invoke his right to counsel under the Fifth and Sixth Amendments and Rule 6.1 broadly, not just the Fifth Amendment and the right to not be interrogated further under *Miranda*. The court's finding that Sanchez invoked the broader rights he possessed is supported by the record before us which includes Sanchez's unrefuted testimony about his invocation of his right to counsel; thus, the finding is not clearly erroneous. *See State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004). The court expressly rejected the state's argument that a narrow invocation of the right to counsel should be inferred from the fact that Sanchez had invoked his rights shortly after Gwaltney read the *Miranda* warning. The court stated that Sanchez's agreement to submit to a test to determine his BAC after the Implied Consent Law was read to him, "cannot be seen as modifying or demonstrating the limited purpose of Defendant's already stated request for an attorney."

¶8 We cannot say the trial court either abused its discretion or erred as a matter of law in granting the motion to dismiss the charges.² We therefore affirm its ruling.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

²Although the trial court arguably might have simply suppressed the evidence or the BAC results, *see Rosengren*, 199 Ariz. 112, ¶¶ 27-32, 14 P.3d at 312-13, the state does not challenge the remedy on appeal therefore we do not address the issue.